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Supreme Court of the United States

OCTOBER TERM, 1958

No. 74

HENRY J. MILLS and OSMOND J. LITOLFF,
Petitioners,

versus

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONERS.

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OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, rejecting and denying petitioners' application for writs of certiorari, mandamus and prohibition has not been published in any official or unofficial reports.

The written opinion of the Supreme Court of Louisiana, denying petitioners' application for writs, as recorded in the minutes of the Court, will be found on page 97 of the typewritten record of the Supreme Court of Louisiana and on page 97 of the printed record.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 U. S. Code, Section 1257 (3) because petitioners contend that they have been denied rights, privileges, and immunities guaranteed them by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

QUESTIONS PRESENTED FOR REVIEW

That the Supreme Court of Louisiana erred in refusing to issue the writs of certiorari, mandamus and prohibition prayed for and erred in failing to annul and set aside the judgments and sentences for contempt against petitioners, and erred in failing to hold that petitioners were legally justified in claiming their privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States of America, when called as witnesses before the Grand Jury of the Parish of Orleans, because:

(a) In answering such questions, such answers would incriminate them or tend to incriminate them, or would afford a link in a chain of evidence which would become the basis of subsequent prosecutions under the laws of the United States of America, or which could lead to the discovery of evidence which could be made the basis of criminal prosecutions against petitioners for violating the income tax law (and other statutes) of the United States of America.

and further, because:

(b) The District Attorney of the Parish of Orleans, who is the legal adviser of the Grand Jury for the Parish of Orleans, and who was the officer who would interrogate witnesses appearing before the said Grand Jury, *in the stipulation entered into* by and between the said District Attorney and Eugene Stanley, attorney for petitioners, *agreed and stipulated*, among other things, *that certain facts should be considered as evidence* herein in lieu of the taking of testimony on the hearing of the rule for contempt, *and among the said facts to be considered as evidence* without the necessity of taking formal testimony thereon (see par. 7 of Stipulation "C" regarding petitioner Osmond J. Litolff, page 53 of the record of the Supreme Court of Louisiana and page 53 of the printed record, and see par. 7 of the Stipulation as to petitioner Henry J. Mills, page 46 of the record of the Supreme Court of the State of Louisiana and page 45 of the printed record) *was the fact that there existed and did exist at the time the said Grand Jury hearing was being held co-operation and collaboration between the District Attorney for the Parish of Orleans, Hon. Leon D. Hubert, Jr., and the United States Attorney for the Eastern District of Louisiana, and the Internal Revenue Service of the United States of America, in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion and that Hon. Leon D. Hubert, Jr., District Attorney for the Parish of Orleans,*

had held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery on the part of certain members of the New Orleans Police Department and income tax evasions, felonies under the laws of the United States of America and the State of Louisiana.

Further, that petitioners were then under investigation by agents of the United States Department of Internal Revenue and other United States officials concerning petitioners' income tax returns for the years 1948 to 1951, inclusive, and petitioners had been required by the investigating officers of the United States to sign waivers against prescription of, and concerning petitioners' income tax returns for the years 1948 to 1951, inclusive, so as to afford such investigating officers of the United States Internal Revenue Service and other officials of the United States Government an opportunity to proceed against petitioners for any violation of the income tax laws or other federal statutes which said investigating officers would claim petitioners had violated, the statutory period of limitation on criminal prosecutions for offenses under the United States Internal Revenue laws (six years) (U. S. Code Title 26-6531) not having elapsed regarding petitioners' income tax returns. (See page 44 of the printed record as to petitioner Mills and page 52 of the printed record as to petitioner Litolff).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States reading in part, as follows:

> " • • • nor shall he be compelled in any criminal case to be a witness against himself" (U. S. Constitution, Amendment V) and
>
> " • • • nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (U. S. Constitution, Amendment XIV).

STATEMENT OF THE CASE

Petitioners, Henry J. Mills and Osmond J. Litolff, on January 22, 1958, were subpoenaed as witnesses before the Grand Jury of the Parish of Orleans and an attempt was made by the District Attorney for the Parish of Orleans to interrogate petitioners, under oath, regarding the current political bribery and income tax evasion by members of the New Orleans Police Department, and others, and petitioners, at that time, on advice of counsel, refused to answer such questions, claiming their constitutional right against self-incrimination under the Constitution of the State of Louisiana (Section 11 of Article One and Section 13 of Article 19) and under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Petitioners, in refusing to answer such questions, (see page 43 et seq. of the printed record as to petitioner Mills and page 51 et seq. of the printed record as to petitioner Litolff) expressed a fear of federal prosecution under the income tax laws of the United States and other federal laws, all felonies, invoking the constitutional provisions above mentioned, because to answer such questions would incriminate, or tend to incriminate them or would afford a link in a chain of evidence which could become the basis of subsequent prosecutions under the laws of the United States of America, or could lead to the discovery of evidence which could be made the basis of criminal prosecutions against petitioners for violating the laws of the State of Louisiana, and or the laws of the United States of America, etc.

Petitioners further contended they were in actual and immediate danger of prosecution by the United States of America, under the income tax law and other federal laws, all felonies, because they were under investigation by the investigating officers of the United States Internal Revenue Department and other United States officials concerning petitioners' income tax returns for the years 1948 and 1951, inclusive, and that the period of limitation on criminal prosecutions for offenses arising under the U. S. Internal Revenue Laws -- six years — had not elapsed regarding petitioners' income tax returns.

Photostatic copies of the waivers signed by petitioner, Osmond J. Litolff, and his wife, for the above years, will be found on pages 71 to 74, inclusive, of the typewritten record of the Louisiana Supreme Court (page 52 et seq. of the printed record), and photostatic copies of the waivers as to pe-

tioner, Henry Mills, signed by the said Henry Mills and his wife, will be found on pages 75 and 78, inclusive, of the typewritten record of the Louisiana Supreme Court (page 44 et seq. of the printed record), and a letter from the United States Treasury Department, Internal Revenue Service, to Petitioner Henry Mills and his wife, acknowledging receipt of the consent waivers above mentioned, will be found on page 79 of the typewritten record of the Louisiana Supreme Court, page 81 of the printed record.

The reasons of the Trial Judge for refusing to uphold petitioners' claim against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution will be found on pages 82 to 89 of the typewritten record of the Louisiana Supreme Court, pages 83 to 91 of the printed record.

The judgment of the trial judge finding petitioners guilty of contempt of court and sentencing each of petitioners to pay a fine of $100 and to serve ten days in the Parish Prison of the City of New Orleans and in default of the payment of said fine to serve ten days additional in the said Parish prison, will be found on pages 94 and 95 of the typewritten record of the Louisiana Supreme Court, and on pages 95 and 96 of the printed record.

Petitioners, after having given due notice to the trial Judge and the District Attorney of petitioners' intention to apply to the Louisiana Supreme Court for writs of certiorari, mandamus and prohibition to review the judgment and sentences finding petitioners guilty of contempt and sentencing them as above set out, filed their application for such writs in the Louisiana Supreme Court.

This application will be found on pages 1 to 22 of the typewritten record of the Louisiana Supreme Court and on pages 1 to 21 of the printed record.

The judgment of the Louisiana Supreme Court denying petitioners' application, and refusing to issue the writs of certiorari, mandamus and prohibition prayed for, will be found on page 97 of the typewritten record of the Louisiana Supreme Court, and on page 97 of the printed record.

Petitioners' application to the Louisiana Supreme Court for a stay of execution, in order to apply to this Honorable Court for a writ of certiorari to the Louisiana Supreme Court will be found on pages 98 of the typewritten record of the Louisiana Supreme Court, and on page 98 of the printed record.

The Order of Hon. John B. Fournet, Chief Justice of the Louisiana Supreme Court, granting petitioners a stay of execution of the mandate of the Louisiana Supreme Court upon petitioners furnishing bond in the sum of $200, (said order being dated March 4, 1958), will be found on page 101 of the typewritten record of the Louisiana Supreme Court, and on page 100 of the printed record, and the bond required by the said Chief Justice, in the sum of $200, duly approved by the said Chief Justice, will be found on pages 110 and 111 of the said typewritten record of the Supreme Court of Louisiana.

The federal questions involved were properly raised by petitioners and passed upon,

(a) In the Trial Court, and

(b) In the Louisiana Supreme Court

and petitioners have exhausted every remedy allowed them under the laws of Louisiana.

ARGUMENT

We believe it to be settled law that a witness called before a Federal Grand Jury has the right to refuse to answer questions that incriminate, or might tend to incriminate him, or subject him to prosecution for the violation of a federal statute; that the provisions of the Fifth Amendment which provide, in part;

> " * * * that no person * * * shall be compelled in any criminal prosecution to be a witness against himself,"

must be accorded liberal construction in favor of the right it was intended to secure.

That the privilege so afforded not only extends to answers that would in themselves support a conviction under a federal statute, but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal crime, etc. (See Hoffman vs. U. S., 371 U. S. 479, 341 U. S. 479, 490 95th L. Ed. 1118 and cases cited therein)

We are not unmindful of the fact that this Honorable Court has held that the privilege against self-incrimination provided for by the Fifth Amendment protects only against

the invasion of civil liberties by the government whose conduct they alone limit, and that a state cannot, by operating within its constitutional powers restrict the operations of the national government within its sphere (see Feldman vs. U. S., 322 U. S. 487, 88 L. Ed. 1408, citing Barron vs. Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672, Brown vs. Walker, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644, Jack vs. Kansas, 199 U. S. 372, 50 L. Ed. 234, 26 S. Ct. 73, 4 Ann. cases 689, U. S. vs. Murdock, 284 U. S. 141, 76 L. Ed. 210, 52 S. Ct. 63.

In an article in the Temple University Law Quarterly, volume 9, page 57 and page 194 (1934-5) by Professor J. A. C. Grant, entitled "Immunity From Compulsory Self-Incrimination in a Federal System of Government," the doctrine of the "two sovereignities rule" is traced and described. (See, also, "Federalism and Self-Incrimination" U.C.L.A. Law Review, Volume 4, 1956-57 by Professor J. A. C. Grant passing upon the federal aspects of the question).

Professor Grant states, on page 58 of the reports of the Temple Law Quarterly, that starting with Brown vs. Walker, supra, the reports are replete with cases in which witnesses have set up the defense that their testimony would incriminate them under the laws of another sovereignty and that prior to that date he had discovered but a single American decision (U. S. vs. Saline Bank of Virginia, 1 Pet. 100, U. S. 1828) on this point.

Professor Grant states that Brown vs. Walker, supra, proved to be the turning point in breaking away from the doctrine of the United States vs. Saline Bank.

In the Saline Bank case the defendants' plea in bar, alleging that the discovery would subject them to penalties under the statutes of Virginia which prohibited the issuance of certain bank notes, was upheld, Chief Justice Marshall stating that "the rule clearly is that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it."

Summarizing the situation, Professor Grant states, on page 69 of the Law Quarterly article, that the Federal Supreme Court in two decisions (U.S. vs. Saline Bank, supra and Ballmann vs. Fagin, 200 U. S. 186 (1906) had definitely held that the national government cannot require a witness to give evidence that will tend to incriminate him under a state law and that the trial courts in numerous cases had made similar rulings and that a New York judge had applied a corresponding rule to state proceedings (see in re Scott, 95 Fed. 818 (1899); in re: Hess, 134 Fed. 109 (1905); In re: Nachman, 114 Fed. 995 (1902); In re: Kanter, 117 Fed. 356 (1902); In re: Hooks Smelting Co., 138 Fed. 954 (1905); In re: Feldstein, 103 Fed. 269 (1900); The Paper Trust Case, unreported, quoted in Brief for appellant, 62 Hale vs. Henkel, 201 U. S. 43 (1906); People vs. Nussbaum, 55 App. Div. 245 67 N.Y. Supp. 492 (1900).

In addition to the cases cited by Professor Grant, we respectfully cite the following cases wherein state courts have held that the privilege of a witness against self-incrimination accorded by the State Constitution extends to protect such witness from testifying as to matters that might tend to

incriminate him in a federal prosecution under a law of the United States:

> People vs. Den Uyl, 318 Mich. 645, 2 ALR 2d 625
> In re: Watson, 293 Mich. 263, 284, 219 N. W. 652
> State vs. Dominguez, 82 So. (2d) page 12, 228 La. 284
> State vs. Doran, 39 So. 2d 894, 215 La. page 151
> State vs. Kelly, 71 So. (2d) 887 (Fla.)

In Marcello vs. U. S., 196 Fed. 2d 437 (1952) (U.S.C.A. 5th Circuit) his Honor, Judge Rives, Circuit Judge, cited with approval, the case of People vs. Den Uyl, supra and stated:

> "With much inconsistency, we may indulge the hope that more state courts will follow the lead of the Supreme Court of Michigan in the view that it seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a state judicial proceeding, which testimony may forthwith be used against him in a federal criminal prosecution."

On page 442 of the Marcello decision, Judge Rives reviewed the jurisprudence on the question of the privilege against self-incrimination and cited U. S. vs. Saline Bank, supra and the opinion of Mr. Justice Holmes in Ballmann vs. Fagan, supra.

Judge Rives frankly admitted that as a Circuit Judge he was bound by the jurisprudence of your honors in U. S. vs. Murdock, supra and Feldman vs. U. S., supra and stated that the doctrine enunciated in these last two cases was so

strongly entrenched that it appears as futile to protest as it is to expect an individual to feel that his constitutional privilege has been safeguarded because the penitentiary into which his answer may land him is under the supervision of the state instead of the federal government.

Judge Rives further stated (page 443) that the Supreme Court, but not his court, may well pause when it considers how far the privilege intended against self-incrimination has been abandoned when a congressional committee is given unlimited power to investigate state crimes to identify the criminals and that such a witness might be confronted with the necessity of choosing one of three courses:

1. Refusing to answer, thereby risking a conviction for contempt;

2. Committing perjury; or

3. Confessing his guilt to a crime against the state.

Judge Rives further pointed out in the Marcello decision that a method by which the privilege against self-incrimination may be completely circumvented suggests itself when we consider that state tribunals may pursue a like course with reference to criminal offenses against the federal government.

(See Poretto vs. U. S., 196 Fed. (2) 392 5th Circuit-USCA)

We respectfully submit that the merits of petitioners' application for relief to your honors against being punished for

contempt do not necessarily involve a departure by your honors from the doctrine of the two sovereignties, above described, and the acceptance of the broader doctrine that the intent of the Fifth Amendment is to prevent a person from being compelled to put himself either in a state penitentiary or a federal penitentiary through forced admissions and the answering of questions which tend to prove him guilty of a federal or state crime.

We respectfully submit that the factual situation in petitioners' application, as disclosed by the record herein, shows that the federal government, through the United States Attorney for the Eastern District of Louisiana, has attempted to do in this case what your honors stated a U. S. Attorney should not attempt to do in Knapp vs. Schweitzer, 78 S. Ct. Reporter, 1302 — July 15, 1958, that is, "take advantage of the state's autonomy in order to evade the Bill of Rights."

Your Honors stated on page 1308 of that decision that if a federal officer should be a party to the compulsion of testimony by a state agency, the protection of the Fifth Amendment would come into play and that such testimony is barred in a federal prosecution, citing Byars vs. U. S., 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520.

Your Honors were not called upon to pass upon the question of collaboration between state and federal officers in Knapp vs. Schweitzer, supra, the record in that case, your honors stating, being barren of evidence that the state was used as an instrument of federal prosecution or investigation.

The facts in this case are entirely different.

The statement of facts as to both petitioners (page 38 of printed record as to the petitioner Mills and page 46 of the printed record as to the petitioner Litolff, paragraph 7 of the printed record, page 45 as to petitioner Mills and paragraph 7 of the printed record page 53 as to the petitioner Litolff) show that the District Attorney of the Parish of Orleans, who conducted the interrogation of petitioners before the State Grand Jury, admitted that there existed cooperation and collaboration between said District Attorney and the United States Attorney for the Eastern District of Louisiana, as well as cooperation and collaboration between said District Attorney and the Internal Revenue Service of the United States of America and its investigators, as well as with the Police Bureau of Investigation of the City of New Orleans, in reference to members of the New Orleans Police Department regarding public bribery and income tax evasions and that said District Attorney for the Parish of Orleans had held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery on the part of certain members of the New Orleans Police Department and income tax evasions, felonies under the laws of the United States of America and the State of Louisiana.

The stipulation between counsel for petitioners and the said District Attorney, in addition to the above admissions, shows (printed record page 43 as to petitioner Mills and printed record page 51 as to petitioner Litolff) that as a reason for claiming the privileges granted them under the Fifth and Fourteenth Amendments to the Constitution of the United States was petitioners fear of federal prosecution under the income tax laws of the United States and

other federal laws, all felonies under the laws of the United States of America, etc.

That petitioners felt that they were in actual and immediate danger of prosecution by the United States of America under the income tax laws and other federal laws, all felonies, in that they were then and had been for some time under investigation by the investigating officers of the United States Internal Revenue Service and other United States officials concerning income tax returns for the years 1948 to 1956 inclusive.

That they had been required by such investigating officers to sign waivers against prescription of and concerning their income tax returns for those years, so as to afford the investigating officers of the United States Internal Revenue Service and other officials of the United States Government an opportunity to proceed against petitioners for any violation of the income tax laws, or other federal statutes, which the said investigating officers should claim petitioners had violated.

That the period of limitation on criminal prosecutions for offenses arising under the United States Internal Revenue Laws is six years (U.S.C.A. 26 — 6531) and that this period of time had not elapsed regarding their income tax returns.

That (see page 44 of the printed record as to petitioner Mills and page 52 of the printed record as to petitioner Litolff) the record contains four documents as to each of the petitioners entitled, "Consent fixing period of limitation upon assessment of income and profits tax."

The stipulation further shows (page 45 of the printed record as to petitioner Mills and page 53 of the printed record as to petitioner Litolff) that the Intelligence division of the Internal Revenue Service of the United States, the United States Attorney for the Eastern District of Louisiana and the United States Grand Jury had been for several months and were presently engaged in investigating some of the members of the New Orleans Police Department for income tax evasion, a felony under the laws of the United States, and that great publicity through the daily newspapers, television and radio had been carried on for several months regarding said investigation.

That eleven indictments had been returned by the United States Grand Jury against members of the New Orleans Police Department in connection with the aforementioned investigations; three for income tax evasion and eight for perjury or false statements.

From the above facts, which will be found in the record, we respectfully submit that petitioners had ample justification for a fear that a forced disclosure before the State Grand Jury of the facts sought to be elicited from them by the District Attorney for the Parish of Orleans would result in the indictment of petitioners by the United States Grand Jury for the Eastern District of Louisiana and a trial for a felony or felonies under the laws of the United States of America.

For all intents and purposes, the United States Attorney for the Eastern District of Louisiana might just as well himself conducted the investigation before the State Grand Jury for the Parish of Orleans.

He did not dare do this personally, because of his official position as a federal prosecutor. He attempted to do indirectly what the laws of the United States prevent him from doing directly, and he sought to do this by not only himself collaborating with the District Attorney for the Parish of Orleans, but by having the agents of the United States Treasury Department, to-wit, the Intelligence Division of the Internal Revenue Service, collaborate with the District Attorney for the Parish of Orleans, in an effort to force from the lips of petitioners facts and evidence which could form the basis of prosecutions against petitioners in the District Court of the United States for the Eastern District of Louisiana.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the Supreme Court of Louisiana should be reversed and the cause remanded in order that petitioners be discharged without date.

Respectfully submitted,

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CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.